Tow Kong Liang v Nomura Singapore Limited

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–906 OF 2001
MOKHTAR SIDIN, MOHD NOOR AHMAD AND ARIFIN ZAKARIA JJCA
13 OCTOBER 2004

Banking — Securities for advances — Guarantee — Principal debtor clause — Effect of clause — Whether clause converted guarantor to borrower

Contract — Guarantee — Principal debtor clause — Effect of clause — Whether clause converted guarantor to borrower

Exchange Control — Finance regulations — Foreign currency transaction between companies resident outside Malaysia — Malaysian guarantor — Whether guarantor was a person buying or borrowing under s 4(2) of Exchange Control Act 1953

Exchange Control — Finance regulations — Foreign currency transaction between companies resident outside Malaysia — Malaysian guarantor — Whether guarantor doing an act in association or preparatory of making any payments outside Malaysia under s 9(1) of Exchange Control Act 1953

Exchange Control — Finance regulations — Foreign currency transaction between companies resident outside Malaysia — Malaysian guarantor — Whether guarantor intending to secure that capital moneys payable on security paid outside Malaysia or preparatory of such intention under s 15 of Exchange Control Act 1953

The respondent agreed to make available to the appellant or his nominated private investment company a short term security financing facility of up to the equivalent of USD$10 million. The appellant nominated Harvey International Limited ('Harvey'), his investment holding company incorporated in the British Virgin Islands, to take up the facility. On 7 July 1997, Harvey entered into a facility agreement called 'Security Agreement (Direct)' with the respondent and on 8 July 1997 the appellant gave a written guarantee and indemnity to the respondent.

The respondent sued Harvey and the appellant when Harvey defaulted on its loan repayments and obtained judgment against them in the High Court in the Republic of Singapore ('the Singapore judgment'). The respondent applied to register the Singapore judgment in the High Court of Malaya under the Reciprocal Enforcement of Judgments Act 1958 ('the Act'). The senior assistant registrar of the High Court at Kuala Lumpur ordered the Singapore judgment be registered as a judgment of the High Court of Malaya. The appellant applied to set aside the registration of the Singapore judgment. The senior assistant registrar dismissed the application. The appellant then appealed to the judge-in-chambers, contending that the registration of the Singapore judgment should be set aside under s 5(1)(a)(v) of the Act for the reason 'that the enforcement of the judgment would be contrary to public policy in Malaysia' because the facility transaction contravened ss 4(2), 9(1),

11 and 15 of the Exchange Control Act 1953 ('ECA') and the security given was also contrary to ss 11(1) and 15 of the ECA. The judge however dismissed his appeal. Dissatisfied, the appellant appealed to this court.

Held, dismissing the appeal:

(1) Clause 2 of the guarantee and indemnity stipulated that 'as between the Guarantor and the Bank, the Guarantor shall be liable under this Guarantee as if he were the sole principal debtor and not merely a surety'. There was no basis for the appellant to contend that the said clause showed that the appellant was the borrower. This clause was only a deeming provision such that if it was not possible for the respondent to recover the full amount from the principal borrower, then the respondent could recover the required amount from the guarantor (or the appellant in this case) as if the guarantor was the principal borrower. The clause was to enable the creditor to recover a debt from a guarantor without the necessity of proving the debt of the borrower who had disappeared or could not be traced or had no means of paying the loan (see para 10).

(2) It might be true that the appellant had arranged for the loan to be given to Harvey but the fact remained that in this transaction, the borrower was Harvey, a company incorporated in the British Virgin Islands. The respondent, on the other hand, was only willing to give the loan to Harvey on condition that the appellant be the guarantor to the said loan. Harvey executed the loan agreement and the money was disbursed to Harvey and not the appellant, while the appellant executed the guarantee to ensure that Harvey repaid the loan. That was the undisputed facts in respect of the transaction. There was no evidence that the loan was given to the appellant. As such, the whole transaction was not caught by the provisions of the ECA because the appellant was not the borrower. Harvey was not a Malaysian resident when the transaction took place. Although the appellant was and is a Malaysian resident, he was not the borrower but the guarantor (see para 11).

(3) Since there was no doubt that the appellant was only the guarantor to the facility given to Harvey and not the borrower, the authorities clearly showed that as a guarantor, the appellant: (a) did not fall into the category of a person buying or borrowing under s 4(2) of the ECA; (b) was a person doing an act in association or preparatory of making any payments outside Malaysia under s 9(1) of the ECA; or (c) a person intending to secure that capital moneys payable on security paid outside Malaysia or preparatory of such intention under s 15 of the ECA (see para 18).

[**Bahasa Malaysia summary**

Responden telah bersetuju mengadakan untuk perayu atau syarikat pelaburan asing yang dinamakan olehnya, suatu kemudahan kewangan sekuriti jangka masa pendek bersamaan dengan nilai USD$10 juta. Perayu telah menamakan Harvey International Limited ('Harvey'), syarikat pelaburan induknya yang diperbadankan di British Virgin Islands, untuk menggunakan kemudahan tersebut. Pada 7 Jualai 1997, Harvey telah memasuki satu perjanjian kemudahan

bertajuk "Perjanjian Sekuriti (Secara langsung)" dengan responden dan pada 8 Julai 1997 perayu telah memberikan suatu jaminan bertulis dan indemniti kepada responden.

Responden telah mendakwa Harvey dan perayu apabila Harvey gagal membuat bayaran ke atas pinjamannya dan telah mendapatkan penghakiman terhadap mereka di Mahkamah Tinggi Singapura ('penghakiman Singapura'). Responden telah memohon untuk mendaftarkan penghakiman Singapura di Mahkamah Tinggi Malaya di bawah Akta Penguatkuasaan Penghakiman Bersaling 1958 ('Akta'). Penolong kanan pendaftar di Mahkamah Tinggi di Kuala Lumpur telah mengarahkan penghakiman Singapura tersebut didaftarkan sebagai penghakiman Mahkamah Tinggi Malaya. Perayu telah memohon untuk mengenepikan pendaftaran penghakiman Singapura tersebut. Penolong kanan pendaftar telah membatalkan permohonan tersebut. Perayu kemudiannya telah merayu kepada hakim dalam kamar yang telah membatalkan rayuan tersebut, sambil mengadu bahawa pendaftaran penghakiman Singapura tersebut patut diketepikan di bawah s 5(1)(a)(v) Akta atas alasan, 'penguatkuasaan penghakiman tersebut akan bertentangan dengan polisi awam di Malaysia' oleh sebab transaksi kemudahan tersebut bertentangan dengan ss 4(2), 9(1), 11 dan 15 Akta Kawalan Pertukaran Mata Wang 1953 ("Akta Kawalan') dan juga cagaran yang diberikan bertentangan dengan ss 11(1) dan 15 Akta Kawalan. Akan tetapi, rayuannya ditolak oleh hakim tersebut. Terkilan, perayu merayu terhadap keputusan tersebut.

Diputuskan, membatalkan rayuan tersebut:

(1) Klausa 2 jaminan dan indemniti menyatakan bahawa "di antara penjamin dan pihak Bank, penjamin akan bertanggungan di bawah jaminan tersebut seperti penghutang tunggal yang utama dan bukan setakat penjamin sahaja'. Tidak terdapat apa-apa dasar untuk perayu mengadu bahawa klausa tersebut menunjukkan bahawa perayu adalah seorang peminjam. Klausa ini adalah hanya suatu peruntukkan menganggap dalam mana sekiranya responden tidak berupaya untuk mendapatkan jumlah sepenuhnya daripada peminjam utama, responden bolehlah mendapatkan jumlah yang dikehendaki daripada penjamin (atau perayu di dalam kes ini) dalam menganggap penjamin seperti peminjam utama. Klausa tersebut adalah untuk membenarkan si piutang untuk mendapatkan semula hutang daripada penjamin tanpa keperluan untuk membuktikan hutang peminjam yang telah menghilangkan diri atau tidak dapat dikesan atau tidak berupaya untuk menyelesaikan hutang berkenaan (lihat perenggan 10).

(2) Ia mungkin benar bahawa perayu telah membuat persediaan untuk pinjaman tersebut diberikan kepada Harvey tetapi fakta tetap wujud bahawa di dalam transaksi ini, peminjam adalah Harvey, sebuah syarikat yang diperbadankan di British Virgin Islands. Responden, sebaliknya, hanya bersetuju untuk memberikan pinjaman tersebut kepada Harvey atas syarat perayu adalah penjamin kepada penjamin tersebut. Harvey telah melaksanakan perjanjian pinjaman tersebut dan wang tersebut

dibayar kepada Harvey dan bukannya perayu, sementara perayu telah melaksanakan jaminan tersebut untuk memastikan Harvey membayar semula pinjaman tersebut. Itu adalah fakta yang tidak dipertikaikan berkenaan transaksi tersebut. Tidak terdapat apa-apa bukti bahawa pinjaman tersebut diberikan kepada perayu. Maka dengan itu, keseluruhan transaksi tersebut tidak termasuk di bawah peruntukkan Akta Kawalan kerana perayu bukanlah peminjamnya. Walaupun perayu adalah merupakan residen Malaysia, dia bukanlah peminjam tetapi penjamin (lihat perenggan 11).

(3) Oleh sebab tidak terdapat keraguan bahawa hanya perayu sahaja adalah penjamin kepada kemudahan yang diberikan kepada Harvey dan bukan kepada peminjam, autoriti-autoriti jelas menunjukkan bahawa sebagai penjamin, perayu: (a) tidak termasuk di dalam kategori pihak yang membeli atau meminjam di bawah s 4(2) Akta Kawalan; (b) adalah seseorang yang melakukan sesuatu yang bersangkut-paut atau dalam membuat persediaan untuk membuat apa-apa bayaran di luar Malaysia di bawah s 9(1) Akta Kawalan; atau (c) seseorang yang berniat untuk memastikan bahawa wang permodalan yang perlu dibayar atas cagaran dibayar di luar Malaysia atau penyediaan dengan niat sebegitu di bawah s 15 Akta Kawalan (lihat perenggan 18).]

Notes

For cases on foreign currency transaction between companies resident outside Malaysia, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2690

For cases on principal debtor clause, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3545–3550

For principal debtor, see 16 *Halsbury's Laws of Malaysia* (2003) para [270.005]

Cases referred to

American Express Sdn Bhd v Dato' Wong Kee Tat & Ors [1990] 1 MLJ 91 (refd)
Bank of New Zealand v Wong Kee Tat [1990] 2 MLJ 435 (refd)
Koh Kim Chai v Asia Commercial Banking Corp [1984] 1 MLJ 322 (refd)

Legislation referred to

Exchange Control Act 1953 ss 4(2), 9(1), 11, (1), 15, 36
Reciprocal Enforcement of Judgments Act 1958 s 5(1)(a)(v)

Appeal from: Originating Summons No R1–24–56 of 1999 (High Court, Kuala Lumpur)

Murthi (Murthi & Partners) for the appellant
Tommy Thomas (Tommy Thomas) for the respondent

Mokhtar Sidin JCA (delivering judgment of the court):

[1] We have dismissed the appeal earlier. We now give our reasons for doing so.

[2] In this appeal, the respondent agreed to make available to the appellant or his nominated private investment company a short term security financing facility of up to the equivalent of US$10 million. The appellant nominated Harvey International Limited ('Harvey'), his investment holding company incorporated in the British Virgin Islands, to take up the facility. On 7 July 1997, Harvey entered into a facility agreement called 'Security Agreement (Direct)' with the respondent and on 8 July 1997 the appellant gave a written guarantee and indemnity to the respondent. When both Harvey and the appellant defaulted on their repayments the respondent sued the appellant and Harvey in the High Court in the Republic of Singapore and on 30 August 1998 obtained judgment for the sum of RM14,294,605.61 and interest thereon. The respondent applied to register the judgment in the High Court of Malaya under the Reciprocal Enforcement of Judgments Act 1958. On 16 August 1999, the senior assistant registrar of the High Court at Kuala Lumpur ordered the Singapore judgment be registered as a judgment of the High Court of Malaya.

[3] The appellant then applied to set aside the registration of the judgment. The senior assistant registrar dismissed the application. The appellant then appealed to the judge in chambers who dismissed the appeal.

[4] Before the Judge, the appellant did not question or deny the validity of the judgment obtained in Singapore but the registration of it should be set aside under s 5(1)(a)(v) of the Reciprocal Enforcement of Judgments Act 1958 for the reason 'that the enforcement of the judgment would be contrary to public policy in Malaysia'. It was submitted that it would be contrary to public policy in Malaysia to enforce the judgment because the facility transaction contravened ss 4(2), 9(1), 11 and 15 of the Exchange Control Act 1953. The security given was also contrary to ss 11(1) and 15 of the Exchange Control Act. Being dissatisfied with the decision of the learned Judge the appellant appealed to this court.

[5] In his memorandum of appeal which is rather brief, the appellant stated as follows:

> TOW KONG LIANG, the appellant above-named appeals to the Court of Appeal against the whole of the decision of the Honourable Mr Justice Dato' Abdul Aziz Bin Mohamad given at the Kuala Lumpur High Court on the 10 September 2001 on the following grounds:
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> (1) The learned judge erred in law and in fact in holding that the transaction did not contravene ss 4(2), 9(1), 11 and 15 of the Exchange Control Act 1953.
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> (2) The learned Judge erred in law and fact in holding that the registration of the foreign Judgment is not contrary to Public Policy.

[6] The appellant's counsel submitted that on 8 July 1997 the respondent approved a loan in the sum of US$10,000,000 to the appellant or his nominated private investment company. On the same day, the appellant executed the guarantee and indemnity in favour of the respondent. One day

before the loan was approved the principal borrower (the private investment company nominated by the appellant) executed a security agreement with the respondent.

[7] It was the contention of the appellant that he is the principal borrower. The private investment company was only a nominee. Since the appellant is the principal borrower, the loan contravened ss 4(2), 9(1), 11 and 15 of the Exchange Control Act 1953. Those sections provide:

4 Dealings in gold and foreign currency

(1) Except with the permission of the controller, no person, other than an authorized dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorized dealer.

(2) Except with the permission of the controller, no person resident in the scheduled territories, other than an authorized dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency from, or selling or lending any gold or foreign currency to, any person outside Malaysia.

9 Payments outside Malaysia

(1) Except with the permission of the controller, no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories.

11 Issue of securities

(11) Except with the permission of the controller, no person shall, in Malaysia, issue any security or do any act which involves, is in association with, or is preparatory to, the issuing outside Malaysia of any security which is registered or to be registered in Malaysia, unless the following requirements are fulfilled:

(a) neither the person to whom the security is to be issued nor the person, if any, for whom he is to be a nominee is resident outside the scheduled territories; and

(b) the prescribed evidence is produced to the person issuing the security as to the residence of the person to whom it is to be issued and that of the person, if any, for whom he is to be a nominee.

15 Payment of capital moneys outside Malaysia

Except with the permission of the controller –

(a) no person in Malaysia shall do any act with intent to secure that capital moneys payable on a security registered in Malaysia are paid outside Malaysia, or that, where the certificate of title to a security is in Malaysia, capital moneys payable on the security are paid outside Malaysia without production of the certificate to the person making the payment;

(b) no person resident in the scheduled territories shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, any such transaction outside Malaysia as is referred to in paragraph (a).

[8] Another section which was not mentioned by the appellant but cited by the respondent in their submission is s 36 of the same Act where it provides:

> 36 Contracts, legal proceedings, etc
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> (1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
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> Provided that this subs shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this Act or for any other reason.
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> (2) Notwithstanding anything in the Bills of Exchange Ordinance, 1949, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Controller under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.

[9] It was submitted by the appellant that the appellant is the actual borrower and not Harvey. Even though Harvey executed the facility agreement and the appellant executed the guarantee, in actual fact the loan was taken by the appellant to be credited to Harvey. The execution of those documents was only a smokescreen to get away from the Exchange Control Act 1953. It was further submitted by the appellant that the whole transaction was only a scheme devised by the respondent to defeat the operation of s 4(2) of the Exchange Control Act 1953. The appellant referred to cl 2 of the guarantee and indemnity which provides:

> 2 As between the guarantor and the bank, the guarantor shall be liable under this guarantee as if he were the sole principal debtor and not merely a surety. Accordingly, he shall not be discharged nor shall his liability be affected by anything which would not discharge him or affect his liability if he were the sole principal debtor (including (1) any time indulgence, concession, waiver or consent at any time given to the customer or any other person, (2) any amendment or supplement to any provision of the agreement, this guarantee or any other agreement, security, guarantee or indemnity, (3) the making or absence of any demand on the customer or any other person for payment, (4) the enforcement or absence of enforcement of the agreement or any other agreement, security, guarantee or indemnity, (5) the taking, existence or release of any other agreement, security, guarantee or indemnity, (6) the bankruptcy or insolvency of the guarantor or winding-up, amalgamation, reconstruction or reorganization of the customer or any other person (or the commencement of any of the foregoing), (7) the illegality, invalidity or unenforceability of or any defect in any provision of the agreement or any other agreement, security, guarantee or indemnity or any of the obligations of the customer or any other party thereunder whether on the ground of *ultra vires*, not being in the interests of the customer, guarantor or any other person, or not having been duly authorized, executed or delivered by the customer, guarantor or any other person, or (8) any other matter or thing whatsoever).

[10] The appellant contended that the above clause shows that the appellant was the borrower because of the words 'the guarantor shall be liable under this guarantee as if he were the sole principal debtor and not merely a surety. It is clear to us that the appellant's contention is without basis. That clause is only a deeming provision whereby if it is not possible for the respondent to recover the full amount from the principal borrower, then the respondent could recover the full amount from the guarantor (in this case the appellant) as if the guarantor is the principal borrower. It does not mean that the guarantor is the borrower. The clause is to enable the creditor to recover a debt from a guarantor without the necessity of proving the debt of the borrower who had disappeared or could not be traced or have no mean of paying the loan. The guarantee is another form of security.

[11] It might be true that the appellant arranged for the loan to be given to Harvey but the fact remained that in this transaction the borrower was Harvey. Harvey was a company incorporated in the British Virgin Islands and it was the vehicle for the appellant to invest. For that purpose the appellant negotiated on behalf of Harvey to get the necessary fund in order to invest. The respondent, on the other hand, was only willing to give the loan to Harvey on condition that the appellant be the guarantor to the said loan. Harvey executed the loan agreement and the money was disbursed to Harvey and not the appellant, while the appellant executed the guarantee to ensure that Harvey repaid the loan. When Harvey failed to repay the loan the respondent took the necessary steps to recover the amount due against the appellant as guarantor. That is the undisputed facts in respect of the transaction. There was no evidence that the loan was given to the appellant and not to Harvey. As such, the whole transaction was not caught by the provisions of the Exchange Control Act because the appellant was not the borrower. Harvey was not a Malaysian resident when the transaction took place. Though the appellant was and is a Malaysian resident, he was not the borrower but the guarantor. We see no merit in the submission of the learned counsel for the appellant that the documents produced by the respondent was only a smokescreen to pull wool over the eyes of the Controller of Foreign Exchange because the real borrower was the appellant and the guarantor was Harvey. He invited us to look at the sequence of the execution of the various documents pertaining to the said loan but he failed to show to us the instances where the execution of those documents was abnormal and that the transaction was to defeat the operation of s 4(2) of the Exchange Control Act.

[12] The respondent, on the other hand, pointed out to us that Harvey executed the loan agreement and the security given before the appellant executed the guarantee to be the other security in respect of the loan. The borrowing was by Harvey and not the appellant. The trial judge in his judgment in respect of s 4(2) stated as follows:

> Learned counsel for the judgment debtor did not say what was the 'act' of the judgment debtor for the purposes of s 4(2). (Malaysia is the only scheduled territory and there is no doubt from his written guarantee and indemnity that the judgment debtor was resident in Malaysia and so in a scheduled territory). If it were the signing of the guarantee and indemnity, there was no proof that he did it

in Malaysia. Learned counsel did not argue how the signing of the guarantee and indemnity can be said to be an act which involved or was preparatory to the borrowing of foreign currency from the plaintiffs. As far as lending is concerned, it was decided by the Supreme Court in *American Express Sdn Bhd v Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91 that the signing of a guarantee is not an act which is preparatory to lending. Learned counsel for the judgment debtor failed to show that the judgment debtor had contravened s 4(2).

[13] In *American Express Sdn Bhd v Dato' Wong Kee Tat & Ors* [1990] 1 MLJ 91, the appellants, a bank incorporated in the United States of America with a place of business in Singapore and resident outside the scheduled territories as defined by the Exchange Control Act 1953, lent money to a Singapore company, Votier, of which the respondents were directors and shareholders. It was agreed that the respondents as directors were to give their personal guarantees for the repayment of the loan for amounts specified in the agreement and that certain shares of a Malaysian company be pledged to the appellant. The Singapore company defaulted in payment of the debt and the appellants sold the shares of the Malaysian company. The appellants subsequently brought a writ against the respondents claiming the sums due under their personal guarantees. The appellants applied for summary judgment which was granted by the Senior assistant registrar. The respondents appealed to the Judge in chambers who allowed the appeal. The appellants appealed to the Supreme Court which allowed the appeal. Harun Hashim SCJ (as he then was), delivering the judgment of the court, at p 94 stated as follows:

> The respondents are Malaysians, resident in Malaysia. They admit that the bank has made the advances and granted the facilities to Votier. They admit that they executed the guarantees and pledged Sri Hartamas Corporation Bhd shares to the bank. But they contend that the guarantees are void, illegal and unenforceable because they contravene the Exchange Control Act 1953 and they are therefore not liable to pay anything to the bank. The facts in the instant case are not in dispute. It is also common ground that the law applicable to the facts of the case is the Exchange Control Act 1953. The only dispute between the parties is the validity of the guarantees.

[14] At p 95 his Lordship continued:

> It was argued that s 4(2) applied in this case because the signing of the guarantees is an act which involves, or is preparatory to, lending foreign currency. It is said that signing the guarantee was an integral part of the lending and formed a single transaction.
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> Now, s 4(2) is differently worded from s 4(1). Sub-section (1) restricts dealings in Malaysia whereas sub-s (2) restricts dealings in Malaysia by residents in Malaysia with persons outside Malaysia. In the UK Act, both provisions are contained in a single subs and worded in terms of our sub-s (1). The wording of our sub-s (2) is non-existent in the UK Act. It is therefore argued that the intention of the legislature is to cast the net wide to include persons who are not the actual buyers/borrowers or sellers/lenders.
>
> We are unable to accept that argument. It is true that the intention of the legislature is to cast the net wider than it does in sub-s (1) but the catch is not persons

who are not buyers/borrowers or sellers/lenders but *the acts* of the buyers/borrowers or sellers/lenders themselves prior to the actual buying/borrowing or selling/lending. Any other interpretation of sub-s (2) will do violence to the language of that subs.

In *R v Aik Hoe & Co Ltd*, a Singapore company was charged with infringement of s 9(1) of the Singapore Exchange Control Ordinance 1953. There, the Singapore company received 34 cables over a three-month period from a Bangkok company. These cables instructed the Singapore company to cable a New York company to make payments of US dollars to certain finance houses and banks in New York for the credit of the Bangkok company. On receipt of these cables, the Singapore company dispatched cables to the New York company in exactly the same terms as the instructions in the cables from Bangkok. The New York company carried out the instructions in these cables and confirmed that they had done so by cable to another Singapore company. These confirmatory cables were collected by the accused Singapore company but no further cable advice was sent by the accused Singapore company to the Bangkok company. The court had to consider when a *preparatory act* is an offence. Section 9(1) of the Singapore Ordinance is in *pari materia* with our s 9(1) which employs the same words as in s 4(2). The material provision of the Singapore subs reads:

> Except with the permission of the Controller, no person shall in the colony do any act which … is preparatory to the making of payment outside the colony … for the credit of a person resident outside the scheduled territories.

At p 59 Whyatt CJ said:

> It will be observed that the act which is prohibited and made an offence by this section is an act in the colony which is preparatory to a further act, namely, making a payment outside the colony for the credit of a person resident outside the scheduled territories. It would not, of course, have been competent for the legislature to make this further act outside the colony an offence in Singapore because of the principle of extra-territoriality and it was no doubt because of the limitations which this principle imposes on enactments of the Singapore legislature, that the section was drafted so as to strike at the preparatory act done within the jurisdiction of the colony.

And at p 61 the Chief Justice continued:

> These arguments by way of *reductio ad absurdum* might have carried weight if s 9 had imposed an absolute prohibition on acts preparatory to the making of payments outside the colony for the credit of persons resident outside the scheduled territories. But s 9 does no such thing. On the contrary it provides that a preparatory act shall be an offence only if it is done without the permission of the Controller. As counsel for the prosecution has rightly emphasized throughout this case, the scheme of the Ordinance is to cast the net wide and at the same time to provide administrative machinery by way of permits and exemptions granted by the controller which will ensure flexibility in the working of the Ordinance and thus prevent anomalies and hardship. I agree that if s 9 is given the wide meaning contended for by the prosecution, it will have the effect of bringing under supervision and control every payment outside the colony for the credit of a person resident outside the scheduled territories whenever an act preparatory to the making of such a payment is done in the colony. It is probable that some of these payments will be innocent, it is certain that all of them will appear to be so.

> Such are the intricacies of foreign exchange and the ramifications of international finance it is not possible, merely by looking at the preparatory act if it takes the form of an isolated cable or letter, to say whether the payment to which it relates is innocent or not. Hence, the legislature has provided that all such acts shall be brought under the control of the Foreign Exchange Controller by requiring the person doing the preparatory act to obtain his permission before embarking upon them. If the controller is satisfied the transaction is innocent and harmless, he will, of course, give his permission, but if there are circumstances giving rise to a reasonable suspicion that the transaction is not all that it appears to be, or that certain documents have not been fully disclosed or that some relevant information is being withheld, he will, no doubt, enquire into the matter further or impose safeguards to ensure that the currency of the colony is protected, before giving his permission. I see nothing absurd or unjust in such a procedure nor in an interpretation of s 9 which leads to such a result. It merely means that a person intending to do a preparatory act within the meaning of s 9 must first obtain the permission of the controller and that anyone who fails to do so, acts at his peril.

It will be observed that the preparatory acts were that of the accused Singapore company itself which in reality directed the payments to be made.

In *Koh Kim Chai v Asia Commercial Banking Corp Ltd*, the Privy Council had occasion to deal with an alleged contravention of our s 9(1). In that case Koh Kim Chai was a Malaysian resident and he had charged his land in Malaysia to a bank in Singapore to secure loans to a Singapore company. The bank sought to enforce the charge. Lord Fraser of Tullybelton said at p 324:

> It was suggested that the enforcement of the security in Malaysia might be contrary to s 3(1) (of the Banking Act 1973) but it seems too plain for argument that the business of 'making advances to customers' cannot by any reasonable process of interpretation be held to include enforcing the security against a guarantor.

On the same page, Lord Fraser on s 9(1) said:

> The contention which was developed in argument was that enforcement of the charge was an act preparatory to the making of a payment outside Malaysia, in respect that it was preparatory to compelling the appellant to pay off the loan to the respondent in Singapore. Their Lordships do not agree. There is no evidence that, if the security is enforced, the respondent will seek to obtain any payment outside Malaysia. It may be content to leave the proceeds in Malaysia.

Here again, the argument that the preparatory acts refer to a third party was rejected. The same argument was also advanced here that enforcing the guarantee was preparatory to making payments contrary to s 9(1) as the permission of the Controller had not been obtained. The evidence is to the contrary as the respondents have no intention of paying anything. There is also no evidence that the bank is demanding payment in Singapore.

As to enforcement of these guarantees, the relevant provision of the Act is s 36 which reads:

> (1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the controller is at the time of the contract

required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:

Provided that this subs shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this Act or for any other reason.

(2) Notwithstanding anything in the Bills of Exchange Act 949, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the controller under this Act, shall be deemed to prevent any instrument being a bill of exchange of promissory note.

(3) The Fourth Schedule shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behalf of creditors.

The Fourth Schedule clearly contemplates that legal proceedings may be brought in Malaysia by foreign creditors against residents of Malaysia. In such cases the law provides that judgments obtained are not satisfied by payments made from Malaysia to judgment creditors outside Malaysia without the prior permission of the controller. Paragraph 4(1) of the Fourth Schedule provides:

In any proceeding in a prescribed court and in any arbitration proceeding, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the controller and of that permission not having being given or having been revoked.

[15] At p 97 his Lordship stated:

What we think has clearly misled the respondents in the instant case are the words 'at the time of the contract' appearing in s 36(1) to mean that prior permission of the controller is required at the time the guarantees are signed and as no such permission had been obtained, the guarantees are illegal and therefore unenforceable. In our view, what that subs means is that if at the time of the contract the law requires that the permission of the controller must first be obtained before its performance, then the performance is postponed until the permission is obtained. The performance in this context is the payment from Malaysia to persons outside Malaysia. The postponement of performance, however, does not prevent the creditor from suing and obtaining judgment. That this is the correct interpretation of ss 4 and 9 read with s 36 is further illustrated by RHC O 22 rr 1 and 9 providing for the payment into court and payment out under the Exchange Control Act 1953. The statutory form of the writ also draws attention to the Exchange Control Act 1953 and is clearly shown on the writ in the present case.

On the facts of this case, it is clear that the entire transaction was between two companies resident in Singapore and the moneys lent and borrowed were in US currency. It is equally clear that the respondents were neither the lenders nor the borrowers. They were the guarantors or third parties to the transaction. The sign-

ing of the guarantees in Malaysia, in our view, is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s 4(2). Nor is the prior permission of the controller required before signing the guarantees under s 4(2).

The prior permission of the controller is also not required under s 9(1) before a foreign plaintiff can sue the defendants in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.

We pause here to observe that bankers, more than any others in the financial world, well know the existence and workings of foreign exchange regulations which exist in almost every country in the world. If they accept a foreign guarantee they take the additional risk that when the time comes to enforce the guarantee they may not be able to get the money out of the foreign country.

Be that as it may, we find that the guarantees executed by the respondents in the present case are perfectly good and valid guarantees and are in no way in contravention of the Exchange Control Act 1953 as there has been no contravention of s 4(2); there is no evidence that if and when the guarantees are to be honoured the parties intended performance without the permission of the controller and accordingly s 6 applies. As the guarantees are not in breach of the Exchange Control Act 1953, the issue of illegality of contract under the Contracts Act 1950 does not arise. We are also satisfied that as the guarantees were executed in Malaysia and the cause of action is the enforcement of the aforesaid guarantees, the courts in Malaysia have jurisdiction.

Apart from another matter which we will refer to presently, the only defence of the respondents to the appellants' claim is that the guarantees cannot be enforced because of the Exchange Control Act 1953. For the reasons we have stated, we hold that the guarantees are valid and enforceable. Further, the respondents by their joint letter of 18 September 1986 have clearly and unequivocally admitted to the claim. As far as this aspect of the case is concerned, the bank is entitled to sign final judgment.

[16] In *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435, the plaintiff successfully applied to the High Court of Malaya to register a Singapore judgment. The defendant applied to set aside the registration on the grounds, *inter alia*, that there was no service of the originating process, that the Singapore court had no jurisdiction over the defendant, and that the registration of the judgment would be contrary to the public policy as the subject matter of the suit was a loan transaction calculated to defeat the provisions of the Exchange Control Act 1953. The registrar dismissed the defendant's application and he appealed to the Judge in chambers. Eusoff Chin J (as he then was) at pp 437 and 438 stated:

As regards the allegation that the borrowing had been transacted without the permission of the Controller of Foreign Exchange ('Controller') and therefore in contravention of s 4 of the Exchange Control Act 1953 ('The Act') and consequently it was void for illegality, this issue had been dealt with by Shankar J in *Bumiputra Malaysia Finance Ltd v Datuk Syed Kechik and Ors* in Kuala Lumpur Civil

Suit C23–1989–86. I agree with the views held by him that the borrowing does not make the act illegal by virtue of s 6 of the Act. Further, the non-obtainment of permission of the Controller before the borrowing puts the borrower or lender to risk of being prosecuted and sentenced under para 7 Part II of the First Schedule to the Act.

It was also held in *Contract and Trading Co (Southern) Ltd v Barbey & Ors* that the Exchange Control Act 1974 does not provide a moratorium for debtors but controls the immediate destination of the payments they make. Moneys due under judgments can be paid into court; thus discharging the debtor, and the fund itself remains out of the control of the creditor until consent had been obtained."

[17] The Privy Council had decided on this issue in *Koh Kim Chai v Asia Commercial Banking Corp Ltd* [1984] 1 MLJ 322. The respondent in that appeal was a bank registered and carrying on business in Singapore. The appellant charged his land in Malaysia as security for advances on current account made by the respondent to a company in Singapore. Subsequently the appellant executed two further charges on the land in favour of the respondent as security for advances by the respondent to two other companies registered in Malaysia. The respondent required payment of the principal and interest on the charge. No payment was made and the respondent applied to the court for an order of sale of the land by public auction. An order was made in the High Court and the appeal to the Federal Court was dismissed. On appeal to the Privy Council one of the issues raised was whether the respondent, in obtaining a charge on land situated in Malaysia as security for a loan and attempting to enforce the charge, was acting in contravention of s 9(1) of the Exchange Control Act. Lord Fraser of Tullybelton (delivering the judgment of the Board) at p 324 stated:

The second contention was that the charge was created in contravention of s 9(1) of the Exchange Control Act 1953. That section provides:

9(1) Except with the permission of the controller, no person shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, the making of any payment outside Malaysia, to or for the credit of a person resident outside the scheduled territories.

Singapore was within the scheduled territories at the time when the loan, or at least the first instalment of the loan, was made. It ceased to be within the scheduled territories on May 8 1973—that is before the charge was executed on May 22 1973. (It was common ground before the Board that these dates were correct, and it appears that the Federal Court must have been under a misapprehension when they said that Singapore ceased to be within the scheduled territories only in 1974). The contention which was developed in argument was that enforcement of the charge was an act preparatory to the making of a payment outside Malaysia, in respect that it was preparatory to compelling the appellant to pay off the loan to the respondent in Singapore. Their Lordships do not agree. There is no evidence that, if the security is enforced, the respondent will seek to obtain any payment outside Malaysia. It may be content to leave the proceeds of sale of the land in Malaysia. Their Lordships agree with the learned judge and with the Federal Court

that the relevant provision of the Act in this case is para 1 of the Fourth Schedule to the Act which provides:

> 1 Part III of this Act [which includes s 9] shall apply to sums required to be paid by any judgment or order of any court … as they apply in relation to other sums, and it shall be implied in any judgment or order of any court in Malaysia … that any sum required to be paid by the judgment, [or] order … to which the said provisions apply shall not be paid except with the permission of the controller.

[18] From the evidence there is no doubt that the appellant was only the guarantor to the facility given to Harvey. He was not the borrower. The authorities clearly show that as a guarantor the appellant did not fall into the category of a person buying or borrowing under s 4(2) or a person doing an act in association or preparatory of making any payment outside Malaysia under s 9(1) or a person intending to secure that capital moneys payable on security paid outside Malaysia or preparatory of such intention under s 15 of the Exchange Control Act.

[19] In his judgment the learned judge stated that the appellant failed to prove that the signing of the guarantee and indemnity was done in Malaysia. The learned judge also found that the signing of a guarantee was not an act which is preparatory to lending. Before us the appellant did nothing more than to repeat what he had contended and submitted before the learned trial judge in the court below. We could not find any error on the finding of the learned judge or in his judgment. For the above reasons, we see no merit in this appeal.

[20] For the above reasons the appeal is hereby dismissed with costs. The deposit is to be paid to the respondent to be taken into the account of taxed costs.

Appeal dismissed.

Reported by Lim Lee Na